after citing this paragraph from the affidavit of Mr. Charles Ong, the respondents' solicitor, that

"Pending the outcome of the action against the sellers the writ herein was filed to preserve the plaintiff's claim against the carriers of the hazel nuts, so that the limitation period would not operate to bar the plaintiff's claim against the carriers,"

thought, against the contention of the appellants that he had no reason to disagree with the Senior Assistant Registrar's acceptance of it as a good reason.

Since the Senior Assistant Registrar had not stated in writing his grounds for renewing the writ, we are unable to ascertain that he had considered the question of or the necessity for good grounds and if he had, what he had regarded as good grounds. But the learned judge, accepting the excuse advanced by Mr. Charles Ong, thought the necessity to preserve the claim a good ground. With the greatest of respect, he was mistaking the wish for the deed. If time had to be stopped running, by the issue of the writ, surely the easiest way to continue to stop time from running and thus preserve the right of action, would be to serve the writ within the 12 months of its life. There might be in some cases difficulties in effecting service. Such difficulties could amount in the circumstances to good reasons. But this was not a case of any difficulty in effecting service. Mr. Charles Ong at the hearing of the appeal advanced a further reason when in answer to a question by the court he advised that the reason for failing to serve was that the parties were negotiating. If he was in contact with the other party or with the solicitors of the other party, there would not be the slightest difficulty in effecting service. Of course, he wanted to preserve the cause of action but he did absolutely nothing to do so. He had failed to keep his powder dry and if his gun misfired, he had only himself to blame.

In our view, the respondents had not advanced a single reason, much less a single good reason for the exercise of the court's discretion in renewing the writ and the discretion ought not therefore to be exercised. We agree with the approach in *New Ching Kee* v. *Lim Ser Hock*[11] and we accordingly allowed the appeal with costs here and in the court below and ordered that the application to renew the writ be dismissed.

Appeal allowed.

Solicitors: *Kean Chye & Sivalingam; Jayaraman, Ong & Co.*

LOH KOON MOY & ANOR. v. ZAIBUN SA BINTI SYED AHMAD

[F.C. (Ong Hock Sim, Raja Azlan Shah & Chang Min Tat F.JJ.) December 3, 1977 and February 18, 1978]

[Alor Star — Federal Court Civil Appeal No. 54 of 1976]

Land law — Agreement to sell land — Specific performance — Damages — Specific Relief Act (Act 137), s. 11(2).

Evidence — Oral agreement varying written agreement — Whether admissible — Evidence Act, 1950, s. 92.

Practice and Procedure — Failure to show representative capacity of defendant in endorsement on writ — Whether this makes action incompetent — Curable irregularity — R.S.C. 1957, O. 3 r. 4, O. 70 r. 1.

In this case the first appellant had agreed to buy a piece of land from the respondent, the administratrix of an estate. An order of court had been given empowering the respondent to sell the land. The learned trial judge found in favour of the appellant but found that there was an oral agreement enabling the respondent to pay damages for breach. He therefore gave damages in favour of the appellant. The appellant appealed, seeking specific performance of the agreement.

Held: (1) there is a presumption in favour of specific performance of a contract to sell land and the respondent had not rebutted this presumption. There were therefore no grounds for the exercise by the learned trial judge of his discretion to give damages in lieu of specific performance;

(2) apart from the question of admissibility of the alleged oral agreement under section 92 of the Evidence Act, there was no consensus as to the terms of the agreement and the learned trial judge was not justified in accepting the evidence of the respondent on this point, when he had all along disbelieved the respondent and her witnesses;

(3) although the representative capacity of the respondent should have been shown in the endorsement on the writ, the omission to do so did not make the action incompetent. It was an irregularity which could be cured.

Case referred to:-

(1) *Oxford & Ors.* v. *Provand & Anor.* (1868) L.R. 2 P.C. 135.

FEDERAL COURT.

S. Jeya Palan for the appellants.

Lim Kean Chye for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the refusal of the learned judge to order specific performance of an agreement to sell land and his decision to award damages instead.

The agreement was in writing made on December 11, 1973, and was made between the respondent and the first appellant. The recital described the respondent thus "... the vendor herself and as administratrix is the owner" of the lands agreed to be sold. The agreed price was $1100 per relong nett. A deposit of $5000 was agreed to be made on the signing of the agreement and the balance was to be paid within one month from the date of the agreement. Time was not made of the essence. The purchaser was to be entitled to vacant possession.

The word "herself" is curious. But from the fact that the purchaser was also said to be acting for herself and as purchaser, it is possibly tautologous and without any significant meaning.

This agreement (Exhibit P1 which appears in pp. 99-100 of the Record of Appeal) is the one sued on.

But there appears to be another agreement, Exhibit P2, appearing in pp. 111-113 of the Record, which is identical with P1 except that it is undated and the price had increased to $1200 per relong. It was signed by the respondent but not by the purchaser.

The agreement P1 was executed not by the first appellant but by the second appellant on her behalf. A point was taken at the hearing that the agreement had not been executed by the purchaser and therefore there was no concluded agreement of sale between them. The learned judge found, with respect, quite correctly, that the 2nd appellant was not merely a broker but an agent as well, even though not armed with a valid power of attorney. No point was, however, taken whether he should join in the action. Under section 183 Contracts Act, he as agent could not sue or be sued.

On the evidence, the learned trial judge found that the deposit of $5000 made by a crossed cheque was a valid tender, that the agreement had not been terminated and was valid and that at all times it was the respondent who had refused to carry out the sale. Against these findings, counsel for the respondent did not contend at the hearing of the appeal. The learned judge also came to the conclusion that the reason for the refusal of the respondent was the not uncommon one of asking at every stage for a higher price. Besides Exhibit P2, there were several other letters from the respondent agreeing to sell if only the price would be increased. The conduct of the respondent could hardly be commended. It was not to the learned judge.

Now there was no difficulty in the way for the respondent to carry out the sale. Though an administratrix, she was empowered with a valid Order of Court, made on March 27, 1970, empowering her to sell as such administratrix the lands, *inter alia*, in question, at prices rather lower than what she had bargained for and obtained in this sale. She had done well for the estate and the other beneficiaries as well as for herself. But her desire to do better even if it was not merely for herself should not be considered, at least not by a court of law and equity, when it clashes with her solemn undertaking.

On the evidence therefore and the submissions made, the learned trial judge found against the respondent and in favour of the first appellant. But he also found on the evidence the existence of a separate oral agreement which was not incorporated into the written agreement for the payment of damages in the event of failure to complete by either party.

The learned judge held this evidence admissible under section 92(b) Evidence Act 1950 and made it the reason for refusing specific performance. He thought that the provision for an alternative remedy displaced the presumption under section 11(2) Specific Relief Act in favour of specific performance, especially as there was an alternative prayer for damages in the appellant's action.

As to the existence of this separate oral agreement, he considered that the evidence of the respondent and her husband who had at all times acted for her, was substantiated by the second appellant. He had however noted that the versions were different. According to the respondent and her husband, she had to refund the $5000 deposit and pay an additional $5000. The second appellant's version was that the respondent had to refund the deposit and pay all the damages. The short answer to the learned judge's finding therefore is that if there was no consensus there was no agreement. But there is, apart from the question of admissibility under section 92 Evidence Act, another objection to his finding, in which from the order to pay an additional $5700, he appeared to have accepted the evidence of the defence. He had all along the line clearly disbelieved the respondent and her witness, but now under a mistaken belief of substantiation, of which there was in fact none, he accepted her evidence. With respect, the inconsistency must bear on the validity of his finding.

Next, the learned judge thought this separate oral agreement for damages good or sufficient enough for him to exercise his discretion to award damages rather than to order specific performance. But it was not the stand taken by the respondent in her pleadings that she would pay damages. Section 18 of the Specific Relief Act provides for a prayer for compensation. Further, section 19 provides that though a sum be named in the contract as liquidated damages and the party in default is willing to pay the same, a contract may be enforced by an order for specific performance. No case has been cited to the effect, and we have not been able to advise ourselves of any, that an alternative prayer for damages, *per se*, absolves the party in breach from having to perform or the court from its duty to consider in the circumstances of the case before it decides whether it would order specific performance or not. As their Lordships of the Privy Council declared in *Oxford & Ors.* v. *Provand & Anor.*[1] at page 151,

> "It is clear that the court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion, the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered."

There is something more, a presumption in favour of specific performance of a contract to sell land, which is statutorily provided in section 11(2) Specific Relief Act which reads as follows:

> "(2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money."

The burden of rebutting this presumption lay on the respondent. Suffice it to say that the respondent had not in any way rebutted it. She had not even sought to rebut it. There existed therefore no grounds for the exercise by the learned judge of his discretion.

On the other hand, there was evidence that the first appellant owned the adjoining lands which were being mined for tin and that she needed the lands in question for the continuation of her mining operations. There is therefore here the element of public policy which operates in favour of an order for specific performance. In our view, the evidence was in favour of specific performance.

There was a cross-appeal which we allowed out of time. It was argued that the action was incom-

petent since the respondent who was sued in respect of a contract entered into by her as the administratrix was not shown either in the writ or the indorsement thereto or in the statement of claim to have been sued in her representative capacity. Though no objection was taken at any stage prior to the cross-appeal, it was however contended that it was not too late to object on this ground. But it was also argued on behalf of the respondent that it was too late for the appellant to object to the evidence of the separate oral agreement for damages at the hearing of the appeal. We have considered the appeal on the basis that this oral agreement was an issue and on the basis, but without deciding, that it was adducible and admissible in evidence and we have discussed the effect of it. We propose to give further consideration to the respondent's point.

We agree that under Order 3 rule 4 Rules of the Supreme Court the representative capacity of the respondent should have been shown in the endorsement on the writ. No case has however been cited to us and we ourselves are unable to find any to support the proposition that the omission made the action incompetent. Neither did Mr. Lim for the respondent contend that the writ was a nullity. If so, the defect is curable under Order 70 rule 1, and having regard to the stage in the proceedings, we would give leave to amend to cure any irregularity there might be.

The appeal is allowed and the cross-appeal is dismissed both with costs. There will be an order that the respondent as administratrix specifically perform the agreement to sell by executing proper and valid transfers of the lands in question upon payment of the full purchase money and a further order that if she defaults, the Senior Assistant Registrar be empowered to execute the relevant documents on her behalf. The 2nd appellant should be struck out from the action and we so order. He will however not be entitled to any costs.

Appeal allowed; Cross-appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Subbiah & Co.*

ABDUL RAHMAN v. SOON AH HAI

[F.C. (Ong Hock Sim, Raja Azlan Shah & Chang Min Tat F.JJ.) December 8, 1977 and February 23, 1978]

[Penang — Federal Court Civil Appeal No. 117 of 1977]

Road Traffic — Collision between motorcycle and motor car — Inferences made by trial judge not supported by evidence — Both parties, to blame.

This was an appeal from the decision of the High Court relating to an accident which took place between a motor car driven by the appellant and a motorcycle driven by the respondent. It appeared from the facts that the accident occurred when the respondent was overtaking a lorry. The respondent said that at that time the appellant's car came at great speed and encroached on his side of the road. The appellant on the other hand said the respondent had suddenly emerged from behind a lorry in an attempt to overtake it and the appellant was unable to take evasive action. The learned trial judge found that the collision took place on the respondent's side of the road and that the appellant was wholly to blame.

Held, allowing the appeal: in the light of the evidence it was inconceivable how there could be acceptance of the respondent's version of the accident. The sketch plan showed the impact to be very near the centre of the road. In the circumstances the appellant and the respondent were equally to be blamed and the liability of the appellant should be 50%.

FEDERAL COURT.

S. Thillaimuthu (*Charles Ong* with him) for the appellant.

Triptipal Singh for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): This appeal concerned an accident occurring at about 7.45 a.m. on December 2, 1974 when motor-car No. PJ 1501 driven by the appellant along Glugor Road in the direction of Jelutong collided with a motor-cycle No. PJ 8067 ridden by the respondent and carrying a pillion towards Bayan Lepas, i.e. in the opposite direction.

The respondent told the court that he was 3-4 feet from his left edge of the road travelling behind a lorry at about 25 m.p.h. when the appellant's car came at a great speed and encroached on his side of the road and collided with him.

The appellant said that the collision occurred as a result of the respondent suddenly emerging from behind a lorry in an attempt to overtake it and that he was unable to take evasive action. He claimed that the impact was in the middle of the road.

With two divergent versions before him the learned judge found that "although the plaintiff was more than 3-4 feet from his left edge of the road, he was still on his side . . . when the collision took place." He agreed that "it was probable that the motor-cyclist was trying to overtake the lorry when the defendant's car encroached on to his side of the road." He went on "whilst it was probable that the defendant's car was more on his side of the road when he passed the lorry, it was also probable that after passing the lorry, the defendant's car began to move obliquely on to the wrong side of the road." From the scratch-mark, the final position of the motor-cycle, the blood-stains on the road, he concluded that the collision took place on the respondent's side and the sole cause of the accident was therefore the behaviour of the appellant in encroaching on the wrong side into the path of the motor-cycle "as it was trying to overtake but before it overtook the lorry."

Counsel for the appellant submitted before us that these findings by the learned judge were based on inferences not in evidence. It was only in cross-examination that he admitted that there was a lorry in front. He asserted that "I was not trying to overtake the lorry in front." As he said earlier "I was travelling at about 25 m.p.h. The lorry was travelling faster.... I was travelling slowly because I was climbing a slope." His pillion rider said that the motor-cycle was 3 feet from left edge, following behind it more than 50 feet away. In the light of this evidence, it is inconceivable how there could be acceptance of the respondent's version of the accident. The physical evidence from the sketch-plan showed the impact to be very near the centre of the road. The lorry would have acted as a shield for the respondent